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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1972

No. 72-6778

EDWARD A. BURT, Petitioner,

vs.

HOWARD YEAGER, The Principal Keeper of the State Prison at Trenton, New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITION NOT PRINTED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972
No. 72-6778

EDWARD A. BURT,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 40-3, Respondent, State of New Jersey, respectfully submits the following additions and corrections to Petitioner's Statement of the Case.

Petitioner, Edward A. Burt, was involved in a shooting in the home of another man. No one was present in the room at the time of the shooting save the decedant and petitioner. After the shooting petitioner left the scene with a woman who had been upstairs at the time of the shooting. Several hours later, petitioner was arrested by police in a different town for breaking and entering a tire store where he was found apparently asleep on some tires. At the time of petitioner's arrest the police were unaware of the shooting. While defendant was in custody, the police learned of the shooting through information provided by the female witness who left the scene of the shooting with petitioner.

At trial petitioner took the witness stand in his own behalf and testified that the shooting was accidental. On cross-examination, petitioner admitted that he did not know whether the man who was shot was alive or dead when he left the house. The prosecutor questioned petitioner concerning his failure to notify anybody

that an accident had occurred and his failure to seek medical attention for the man.

The following day defense counsel requested a curative instruction because the questions were claimed to be an infringement of petitioner's Fifth Amendment right to remain silent. The trial court stated that the cross-examination was proper and that no curative instruction was needed. Petitioner raised this point on subsequent appeals from his conviction for second degree murder within the state courts and petitioned for certiorari to the United States Supreme Court on the issue. That petition for certiorari was denied on January 17, 1972. *Edward Burt v. New Jersey* 404 U.S. 1047 (1972).

After denial of certiorari petitioner filed a petition for a writ of habeas corpus which was granted by the District Court on the grounds that petitioner's silence was not inconsistent with his trial testimoney and reference to his silence consequently violated his Fifth Amendment privilege against self-incrimination. *United States ex rel. Burt v. Yeager*, 342 *F. Supp.* 188 (D.N.J. 1972). (Pal5 to Pa37). The State of New Jersey appealed from this order, and on March 13, 1973, the United States Court of Appeals reversed the judgment of the District Court and remanded with instructions that the District Court deny the petition for writ of habeus corpus. ———F. 2d. ——— (1973). Docket No. 72-1550. (Pal to Pal4).

On May 19, 1973 defendant filed and docketed a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Jurisdiction is predicated on 28 *U.S.C.* §1254 (1).

REASONS FOR DENYING THE WRIT

POINT I

PETITIONER'S CONDUCT AFTER THE SHOOTING WAS INCONSISTENT WITH HIS TRIAL TESTIMONY; CONSEQUENTLY, THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH OTHER JURISDICTIONS.

On direct appeal from petitioner's conviction for second degree murder, the Superior Court of New Jersey, Appellate Division, held that petitioner's silence and inaction after the shooting was inconsistent with his testimony at trial. It stated,

> 'Defendant's failure to tell anybody at the time that the shooting of Owens was accidental was relevant to the issue of the credibility of his courtroom testimony and was permissible." *State v. Burt*, 107 *N.J. Super.* 390, 393 (App. Div.), 258 A.2d 711 (1969), aff'd o.b. 59 *N.J.* 156, 279 A.2d. 850 (1971), *cert.* denied 404 *U.S.* 1047 (1972).

Justice Hall of the Supreme Court of New Jersey, who concurred in part and dissented in part (as to the sentence) from the affirmance of this judgment, stated that the case seemed to fall within the decisions dealing with "cross-examination questioning and summation comments that relate to a failure to previously volunteer an exculpatory explanation testified to at trial, as a means of challenging the credibility of the testimony." *State v. Burt, supra*, 59 *N.J.* at 164, 279 *A.2d.* 850 (1971). Justice Hall emphasized, however, that this issue did not have to be resolved because the "prosecutor was realistically only trying to bring out the perfectly relevant point that a man would not leave his friend, critically injured by a shot, without seeking assistance for him or at least telling some third party about the situation, if his claim of an accidental event were true." *Ibid.* This issue was the subject of a previous petition for certiorari from the direct appeal of conviction, and this Court denied certiorari. 404 *U.S.* 1047 (1972).

In granting petitioner's application for writ of habeus corpus,

the United States District Court rejected the finding by the New Jersey courts that petitioner's failure to seek assistance for his friend after the shooting was inconsistent with his trial testimony and characterized the prosecutor's questions as relating only to the period of time when petitioner was being interrogated for other unrelated offenses. It did not feel petitioner had a duty to alert anyone including the police about the fact that his friend had been wounded, and it held that the writ of habeus corpus "must issue because the prosecutor's use of petitioner's silence violated his Fifth Amendment rights." 342 *F. Supp.* at 193, (Pa28). According to the District Court, there might be some circumstances under which " 'silence' in a Fifth Amendment context, could be used to impeach a witness-defendant, however, such silence must at least be inconsistent with trial testimony of the witness-defendant." *Id.* at 195. (Pa34). The court concluded,

> "Admittedly, interpreting the consistency or inconsistency of silence is a highly speculative venture. On the basis of an evidentiary evaluation of the transcript, this court can not say that petitioner's custodial silence was inconsistent with his trial version of an accidental shooting. His silence may fairly be construed as reliance on his constitutional rights which is consistent with a subsequent assertion of innocence. See *Fagundes v. United States*, 340 *F.2d.* 673 (1st Cir. 1965)." *Ibid.*

In reversing the order of the District Court, the United States Court of Appeals for the Third Circuit in a *per curiam* opinion disagreed with the District Court's characterization of the facts and accepted the finding of New Jersey courts that petitioner's conduct was inconsistent with his trial testimony:

> "It seems as it did to the trial court before which he was physically present and could be heard and observed, that a man who had just accidentally shot his friend and was unaware of the person's resultant condition, would seek aid, or at least tell someone so that help could be obtained. Burt was arrested later that evening by police for breaking and entering the tire store. That arrest was in no way connected with the shooting of Shorty Owens. Burt made no

> mention to the police of what had happened to Owens. Under the circumstances appellant was not claiming a privilege in the face of the accusation of killing Owens as in *Miranda*. What Burt was accused of by the police was breaking and entering the tire store." (Pa5).

According to the Court of Appeals, petitioner's reliance on *Miranda v. Arizona*, 384 *U.S.* 436 (1966) and other cases discussing the right to remain silent and the privilege against self-incrimination was misplaced. The decision in *Miranda* set out the general rule "that the prosecution may not use at trial the fact that someone stood mute or claimed his privilege *in the face of accusation.*" The court stated,

> "The purpose of the rule is to see to it that the person accused of a crime cannot be forced to admit having committed it while under duress of any kind. In this instance, insofar as the shooting was concerned that problem did not exist. Had Burt commented on the shooting, it would not have been to refute an accusation. The police had arrested and detained Burt solely on the charge of breaking and entering. There was no reason for him not to comment on the allegedly accidental shooting. Therefore the basis for the necessity of Fifth Amendment protection did not exist in the then situation. It would have been totally unjustifiable to preclude the use of Burt's prior inconsistent conduct when showing the unreliability of defendant's testimony during cross-examination." (Pa5).

The issue as indicated by both the Court of Appeals and Justice Hall in his concurrence is *not* whether petitioner's silence in the facts of accusation could be viewed as impeaching his exculpatory trial testimony. The issue is whether petitioner's failure to act at the time of the offense and during the period before the police learned of the shooting is inconsistent with his trial testimony. Petitioner's conduct in failing to seek aid or tell anyone that an accident had occurred is *prima facie* inconsistent with his trial testimony that the shooting was accidental and that

he did not know the victim's condition when he left the house. 3A Wigmore, *Evidence* §1042 (Chadborne rev. 1970). *Cf. United States v. Ramirez*, 441 *F. 2d.* 950 (1971), *cert.* den. 404 *U.S.* 869 (1971), reh. den. 404 *U.S.* 987 (1971); *Sharp v. United States*, 410 *F.2d.* 969 (5 Cir. 1969); *State v. Jackson*, 201 *F.2d.* 279 (1968), *cert.* den. 394 *U.S.* 908 (1969); *State v. Laskey*, 21 *Ohio St.* 2*d.* 187, 257 *N.E.2d.* 65 (1970); *People v. Calhoun*, 33 *Mich.App.* 141, 189 *N.W.2d.* 743 (Ct.App. 1971); *People v. Graham*, 29 *Mich. App.* 528, 185 *N.W.2d.* 627 (1971), aff'd. 386 *Mich.* 452, 192 *N.W.2d.* 255 (1971); *People v. Farley*, 267 *Cal.App.2d.* 214, 72 *Cal.Rptr.* 855 (1968); *May v. State*, 211 *So.2d.* 845 (Miss.Sup.Ct. 1968); *Merritt v. State*, 107 *Ga.* 675, 34 *S.E.* 361 (1899).

As a matter of common sense, it would have been natural for petitioner to immediately seek medical aid for his friend, or tell someone of the "accident" to insure his friend woud receive medical attention. This is especially true if, as the petitioner testified, the shooting occurred accidentally, and petitioner was unaware of whether his friend was alive or dead when he left the house. Petitioner's silence and inaction cannot reasonably be viewed as an exercise of his Fifth Amendment privilege in this context. It is respectfully submitted that petitioner's failure to act as a reasonable person would have acted if he were involved in an accidental shooting is relevant in assessing the credibility of petitioner's trial testimoney.

Furthermore, petitioner's failure several hours later to tell the police of the accidental shooting was also inconsistent with his trial testimony. Since petitioner testified that he did not know the condition of his friend although he obviously knew that Shorty had been shot, the victim might still have been alive and in need of medical assistance. Petitioner was not arrested by the police for shooting his friend; he was arrested in Clementon, New Jersey for breaking and entering a tire store, a crime totally unrelated to the shooting. There is no suggestion petitioner thought he was under arrest for anything other than the breaking-entry charge. At the time of his arrest neither the police in Clementon nor the police in Camden were aware of the shooting incident.

The fact that petitioner failed to inform the police of the occurrence is significant since the police officers were the only known persons, other than Mrs. Adams, with whom the defendant had come into contact after the shooting. Thus, aside from

petitioner's failure to immediately seek out aid or seek out anyone to obtain aid, he failed to relate the incident and the fact that his friend was wounded when given the opportunity.

Petitioner relies on the decision in *Fowle v. United States*, 410 *F.2d.* 48 (9th Cir. 1969) in support of his contention that there is a split of authority among Circuit Courts of Appeal created by the decision in the case at bar. He fails to appreciate a fundamental distinction between this case and *Fowle*. In *Fowle* the defendant was asked on cross-examination whether at the time of his arrest on narcotics charges he remained silent instead of offering his exculpatory explanation that he was working undercover for one of the narcotic agents. *Fowle* answered that he had remained silent. On the basis of this Court's decision in *Grunewald v. United States*, 353 *U.S.* 391 (1957), the court in *Fowle* held that prior statements are admissible for impeachment only if they are *in fact* inconsistent with statements made at trial. Since the government admitted that *Fowle* was properly exercising his privilege to remain silent in the face of custodial interrogation and was under no duty to respond to the officer's accusations, the Court concluded that there was no inconsistancy between his silence after arrest and his trial testimony. Thus, the gist of the decision in *Fowle* is that it is not inconsistent for an accused to stand mute or claim his privilege against self-incrimination in the face of police interrogation about the crimes for which he is in custody.

The distinction between *Fowle* and the case at bar is apparent: the prosecutor's questions in this case did not relate to silence in the face of accusation. It concerned petitioner's failure to seek medical assistance or tell "anyone" about the alleged accident after the occurrence and before the police were notified and became aware of the shooting.

All of the decisions cited by petitioner as consistent with the opinion in *Fowle* merely reiterate that before the pretrial conduct or "non-utterance" of a defendant can be used to impeach his credibility, it must be demonstrated to be inconsistent with his testimony at trial. Silence in the face of an accusation while in custody is not deemed inconsistent with an exculpatory explanation at trial. *Robideau v. Rhay*, 431 *F.2d.* 880 (9th Cir. 1970); *United States v. Semenshon*, 421 *F.2d.* 1206 (2nd Cir. 1970); *United States v. Nolan*, 416 *F.2d.* 588 (10th Cir. 1967); *United States v. Brinson*, 411 *F.2d.* 1057 (6th Cir. 1969);

Fagundes v. United States, 340 *F.2d.* 673 (1st Cir. 1965). The courts of New Jersey have long recognized this principle. See *State v. Ripa*, 45 *N.J.* 199 (1965); *State v. Griffin*, 120 *N.J.Super.* 13 (App.Div. 1972), certif. den 62 *N.J.* 73 (1972).

There was ample justification for the finding of both the New Jersey courts and the United States Court of Appeals that petitioner's conduct in failing to seek medical assistance or tell anyone that his friend was wounded was in fact inconsistent with his "accident" explanation at trial. This finding is not in conflict with the decisions of other jurisdictions and circuits, but is logically reconcilable.

The argument that petitioner raises of a possible conflict occuring between jurisdictions if comment is made by the prosecutor on silence in the face of accusation for purposes of impeachment is interesting but not involved in the case at bar. That contention, and the controlling effect of *Harris v. New York*, 401 *U.S.* 222 (1971), was the central issue in *United States v. Ramirez*, *supra*, 441 *F.2d.* 950 (5th Cir. 1971), *cert.* den. 404 *U.S.* 869 (1972) and in *People v. Calhoun*, *supra*, 33 *Mich. App.* 141, 189 *N.W.2d.* 743 (Ct.App. 1971). The majority opinion of the Court of Appeals below referred to the decisions in *Harris* and *Ramirez* by way of analogy, but these cases were not necessary to the resolution of the issue.

Nevertheless, the State agrees with *Ramirez* and *Calhoun* that the reasoning of this Court in *Harris* would seem equally applicable to inconsistent conduct or inconsistent "non-utterances" as to inconsistent statements, *i.e.* "(t)he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 *U.S.* at 226.

Since the case at bar does not involve comment on silence in the face of accusation, it does not present the Court with an opportunity to "clearly delineate the parameters of its prior holding in *Harris*," as petitioner urges. Consequently, it is the State's view that petitioner has failed to demonstrate sufficient grounds for granting certiorari since there are no "special or important reasons" involved and the decision is in accord with prior applicable decisions of this Court and other courts of appeals.

CONCLUSION

For all the foregoing reasons, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition pending before this court not issue.

Respectfully submitted,

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